Harvard Law School, in the latter capacity succeeding the late James Barr Ames, with whom he possessed many high ideals of scholarship and many admirable characteristics in common. In complete devotion to the school of which he was now an officer and to the great cause it served, in patient, courteous, self-denying consideration of the problems and the needs of hundreds of students, in zeal for the highest possible standards of legal scholarship, in an almost stern holding of himself to the most exacting standards of duty as administrator, teacher and scholar, Dean Thayer soon proved himself a worthy successor of a most lovable and truly great man.

It is not merely that he possessed an intellect that was at once brilliant and subtle and of broad vision, not merely that he had developed rapidly into a skillful and inspiring teacher, or that his scholarship, already proved, seemed destined to be most productive, that causes Dean Thayer to be so deeply and so widely mourned. These qualities, a conscience that had the intensity without the narrowness of what we sometimes call the New England conscience, a constant idealism and a rare courtesy combined to make a personality winning and yet compelling and remarkable above all for a certain fineness which it is perhaps impossible to describe but which lingers inspiringly in the memories of hosts of friends.

About two years ago Mr. Thayer had been nominated by Governor Foss to the Supreme Judicial Court of Massachusetts, a position which had peculiar attractions for him, devoted as he was to the traditions and the achievements of that splendid court. Perhaps the extreme conscientiousness of the man, his self-effacing devotion to duty, his modesty and his idealism cannot be better set forth than in the following extract from a letter to a friend who had written to him concerning his declination of this proffered appointment.

"The position was very attractive to me, not only because I have a great sentiment for our court, and it has always been my special ambition to serve on it, but also because I feel that I am a good deal better fitted both by training and natural capacity for work on the bench than for teaching. Nevertheless the question at no time seemed to me even doubtful, and my experience of four years ago when I was asked to come to the Law School, taught me what a really doubtful question about one's career means. I could not make it seem anything less than the desertion of a simple duty to drop the School at this time, particularly in the middle of the school year. This is not the sort of turn which a managing director should serve the Institution, however it might be with others; I knew how my father would have felt about it and I agreed with his opinion. My only doubt was whether the school really needed me. On this point I have been seriously shaken up during my moods of depression during the last few years, but when I put the question to some of my colleagues * * * they would not admit that the school would gain by my going."

THE COMMODITY CLAUSE OF THE HEPBURN ACT.—The Supreme Court of the United States has added another to the interesting line of cases construing the so-called "Commodity Clause" of the HEPBURN ACT of 1906. In

United States v. *Delaware, Lackawanna & Western Railroad Co. and the Delaware, Lackawanna & Western Coal Co.,* decided on June 21, 1915, 35 Sup. Ct. 873, the court reversed the decree of the District Court as reported in 213 Fed. 240, and found the relation and contract between the Railroad Company and the Coal Company to be in violation of the HEPBURN ACT and the SHERMAN ACT.

The evils of favoritism, discrimination, and monopoly, fostered by the shipment of articles or commodities manufactured, mined or produced by the carrier railroad, led to the enactment by some of the states, notably some in which mining is important, of statutes forbidding a carrier to own or have an interest in articles or commodities carried by it. It has been said that the commodity clause of the HEPBURN ACT probably was suggested by the decision of the Supreme Court in *New Haven Railroad* v. *Interstate Commerce Commission,* 200 U. S. 361. See Cong. Rec. Vol. 40, pp. 6618-23, 6680-86, 6693, 6757-8. That case was decided on the point that a contract was unlawful by which the Chesapeake and Ohio had sold coal owned by it to the New Haven at a price that did not leave to the selling road the usual tariff for carrying the coal, and therefore resulted in that discrimination in rates forbidden by the INTERSTATE COMMERCE ACT. The court expressly put out of view for the moment the provisions of a West Virginia statute which made it unlawful for any railroad to engage in the business of buying and selling coal or coke, and it especially declined to consider whether an act forbidding the carriage of coal owned by it by a carrier which before the passage of the act had become the owner of extensive coal fields would be confiscatory and unconstitutional. No Federal law at that time forbade the carrier to act in that dual capacity, and the constitutionality of the West Virginia statute was not passed upon. This case was decided Feb. 19, 1906, and on June 29 following the HEPBURN ACT, containing the commodities clause, became a law. This clause forbids any railroad company to carry in interstate commerce after May 1, 1908 "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The clause was at once attacked as unconstitutional under the Fifth Amendment, but on May 3, 1909 in *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, Mr. Justice WHITE, who had rendered the opinion in the *New Haven* case, rendered an opinion in which he interpreted the meaning of the commodities clause, and as so interpreted held it to be a constitutional exercise by Congress of its power to regulate commerce. His language is open to the inference at least that if the meaning urged by the government had been adopted the act would have been an unconstitutional interference with the rights of private property, because it would have prevented a carrier from carrying property it had at any time owned or produced. According to the interpretation adopted the railroad company was not forbidden to carry such property, if before the act of transportation

it had in good faith dissociated itself from such article or commodity, and at the time of the transportation does not own, in whole or in part, or have an interest, direct or indirect, in a legal or equitable sense in, the article or commodity. The conclusion was that this did not include articles or commodities manufactured, mined, produced or owned by a bona fide corporation in which the railroad company is a stockholder. As the case had been brought as a test case no penalties were decreed. Justice HARLAN dissented, urging that to allow a railroad to own stock—certainly if it owns a majority or all the stock—in the corporation which produced or owned the commodity, would enable the carrier by one device or another to defeat the purpose of Congress to divorce production and transportation, and thereby to prevent injustice to other owners of coal.

As Justice HARLAN anticipated, carriers were not slow to seek devices. They were confronted with a serious problem. They owned coal properties of great value, some of them had been organized largely to market this coal, and they were acting under charters granted years before by the State of Pennsylvania. How could they readjust a business involving property of such magnitude so as not to cause great and unjust loss to the owners? The first attempt came to grief in *United States* v. *Lehigh Valley Railroad Co.*, 220 U. S. 257, in which Justice WHITE, now become Chief Justice, held that a carrier could not satisfy the act by organizing a coal company in which the carrier owned all the stock and used the power thus resulting to deprive the coal company of all real independent existence, making it virtually a mere agency or department of the railroad company. In *Delaware, Lackawanna & Western Railroad Co.* v. *United States*, 231 U. S. 363, the court, speaking now by Mr. Justice LAMAR, held that the railroad could not carry in interstate commerce hay purchased by it, of which it used 25% in its mining business, and intended 75% for sale. It also held that the act applied to goods from point of production to market, and also from market to that point.

After each of these decisions the coal-carrying roads were busily engaged in rebuilding their corporation plant so as to make it conform to the requirements laid down by the court. The Delaware, Lackawanna & Western for a brief time assured itself that it had succeeded by organizing the Delaware, Lackawanna & Western Coal Co. with a capital stock of $6,800,000, which was offered to the stockholders of the railroad company, to be paid for out of a cash dividend declared by the railroad company. Ninety-nine per cent of the stockholders subscribed, the vice-president of the railroad company was elected president of the coal company, and other, but not all, officers and directors of the coal company were also officers and directors of the railroad company. The latter prepared a contract, which the former signed, by which the coal company was to buy all the coal offered by the railroad company and lease the coal handling facilities owned by that company. The railroad company carried the coal to market for the tariff rate, just as it carried goods for other shippers, but the coal company had full charge of the sale of the coal, kept its own books, deposited its funds in its name in banks of its own choosing, and distributed the profits solely to its

own stockholders. At first all but 2,249 shares of $50 each were owned by those who were also stockholders in the railroad, but in four years owners of 88,116 shares of railroad stock held no coal stock, and 6,907 shares of coal stock were held by parties with no interest in the railroad stock. In the District Court this organization successfully withstood the attacks of the government, McPHERSON, Circuit Judge, finding that the companies had acted in good faith, in obedience to the decisions of the Supreme Court, that the distinction between the two corporations had not been obliterated, nor their affairs so commingled as by necessary effect to make their affairs indistinguishable, and that the two are separate and distinct corporations engaged in separate and distinct operations.

But now, in the principal case, Mr. Justice LAMAR again speaking for the court, it is found that this arrangement is unlawful, not necessarily because the stock of the coal company was owned by stockholders in the railroad company, but because the contract drawn by the railroad company and signed by the coal company so bound and limited the coal company as to its freedom to buy coal, the amount it should buy, the price it should pay, and receive, as to leave the coal company neither an independent buyer nor a free agent. The contract violated both the HEPBURN ACT and the SHERMAN ANTI-TRUST ACT. So long as the stockholders of the two companies were the same it might have made no difference to them, but it did affect the interest of the public. It need not be shown that the contract actually had operated to the injury of the public, its validity depends on its terms, which as matter of law were in restraint of trade and operated to make the coal company merely the sales agent of the railroad company. In closing, the court points the way with a clearness that has been wanting in previous decisions, to the sort of plan that will meet the requirement of the statute. The railroad company, if it continues to own and operate the mines, must absolutely dissociate itself from the coal before the transportation begins; it cannot sell to an agent by whatever name he may be called; if it sells all its coal to one buyer it must leave that buyer as free as any other buyer who pays for what he bought, and with complete freedom to extend his business as an independent dealer in active competition with the railroad company. It should not sell to a corporation with common officers and offices, for the policy of the statute requires that they should studiously and in good faith avoid anything that remotely savors of joint action, joint interest, or the dominance of one company by the other. In this the court seems at least to have changed the view it was supposed to entertain that the railroad company might own a majority, or possibly all, the stock of the coal company, for such ownership would carry virtual, if not theoretical, dominance, and would savor not remotely but proximately of joint interest. This decision, while clearly of great importance, manifestly does not close the controversy. The railroad is enjoined from further transporting coal sold under the contract of 1909, and must now of course seek to make another contract and another adjustment in accordance with its understanding of the intent of the court. E. C. G.